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OPINION ON THE DRAFT LAW OF GEORGIA ON DE-OLIGARCHIZATION

GEORGIA

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Based on an English translation of the Draft Law, as provided by the requesting authority.

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EXECUTIVE SUMMARY

The Draft Law of Georgia on De-oligarchization (Draft Law) was initiated by the Parliamentary Working Group on De-oligarchization, created under the Legal Affairs Committee of the Parliament of Georgia with the aim to meet priorities defined by the European Commission in response to the application for integration into the European Union (EU). As one of the preconditions for receiving candidate status, the European Commission recommended to "*implement the commitment of 'de-oligarchization' by eliminating the excessive influence of vested interests in economic, political, and public life*."

ODIHR would like to acknowledge the government's efforts to meet the EU preconditions and the Draft Law's stated objective and attempt to reduce the excessive influence of vested interests in economic, political, and public life as this phenomenon unquestionably undermines democracy and the rule of law. At the same time, there are no specific international norms or OSCE commitments directly related to eliminating the excessive influence of so-called "oligarchs" or regulating "de-oligarchization", nor a universally agreed legal concept of "oligarch". This may explain the difficulty for the legal drafters to provide definitions of such terms that comply with the principle of legal certainty and foreseeability or developing human rights-compliant mechanisms to limit the excessive influence of so-called "oligarchs" in political and public life.

In addition, many provisions of the Draft Law have the potential to unduly impact upon the exercise of human rights and fundamental freedoms, rule of law principles, and democratic legitimacy, in general.

The question arises whether the path chosen in the Draft Law to target so-called "oligarchs" is the most adequate, effective and human rights-compliant way to achieve the stated objective. To define an individual as a so-called "oligarch", the Draft Law requires the combination of at least three of the following four criteria – involvement in political life, significant influence over the mass media, ownership of companies in a monopolistic position and personal wealth. It is questionable that these criteria, which individually do not *per se* relate to any illegal behaviour or characteristic, may, when combined together, justify the limitations of human rights and fundamental freedoms, or other far-reaching consequences envisaged in the Draft Law. Furthermore, the combination of three of the four criteria could mean that an individual who is not even involved in political life (first criteria) could still qualify as an "oligarch" and be subject to the restrictions thus potentially leading to stigmatization of individuals based on their property status.

Instead of attempting to define and target so-called "oligarchs", which appears challenging if not impossible, it would appear more effective and human rights-compliant to pursue a holistic, structural and systemic reform to prevent, reduce or eliminate the phenomenon of excessive influence of vested interests in economic, political, and public life. Such reform could consist of enhancing the overall legal and institutional framework in the fields of anti-corruption, conflict of interest, public integrity, lobbying legislation, political party and election campaign financing, anti-monopoly and competition legislation, anti-money laundering, corporate governance, banking and taxation regulations, enhancing public openness, transparency and accountability, gender equality and women participation in political life etc. In many of these fields, guidance and recommendations at the international and regional

levels exist to devise legislation in compliance with international human rights standards and OSCE human dimension commitments.

It should also be noted in addition that the European Commission's recommendation to eliminate *"the excessive influence of vested interests in economic, political, and public life"*, does not necessarily require adoption of a specific law and could rather be addressed through a combination of above-mentioned measures. ODIHR remains at the disposal of the authorities for any further assistance that they may require should they want to pursue such a more holistic, structural, and systemic reform, including by sharing examples of good practices and offering legal analysis of the relevant legislation.

At the same time, any such comprehensive reform should also aim to ensure that the relevant, competent public oversight bodies and institutions present the necessary guarantees of institutional independence and are equipped with effective investigative and sanctioning powers, adequate financial, human, and technical resources, and are trained to effectively implement their mandate. An independent and impartial judiciary is also central to make these policies effective, along with adequate procedural and substantive safeguards and effective legal remedies, to minimize the risk of abuse. Therefore, any such approach should also be accompanied with further judicial reform to strengthen the independence, impartiality and integrity of the judiciary (on this matter, please see 2023 Opinion on the Draft Amendments to the Legal Framework on the Judiciary of Georgia).

Since on 21 March 2023, the Parliament of Georgia decided to return the Draft Law to the second reading with the aim to revisit it substantively, in addition to the above-mentioned concerns, this Opinion seeks to identify specific deficiencies, which make this Draft Law incompatible with international human rights standards and OSCE human dimension commitments. In this respect, this Opinion will address a number of issues that are especially concerning and should be taken into consideration by the legislator in the context of ongoing discussions on the Draft Law. This is without prejudice to the concerns expressed in relation to the personal approach of targeting "oligarchs" versus a more holistic and structural approach.

First, many provisions of the Draft Law are vaguely and/or broadly framed and potentially subject to diverging and arbitrary interpretation and application by public authorities, thereby presenting a real risk of being misused as a political instrument. Specifically, certain elements of the criteria used for the recognition of a person as an "oligarch" are unduly broad and vague, which could contribute to an arbitrary or unequal application of the law, subjecting some individuals and excluding recognition for others, as well as potentially discriminating persons based on personal and political perceptions.

To a larger extent, unclear provisions, coupled with the proposed measures and restrictions embodied in the Draft Law may potentially unduly impact the exercise of human rights and fundamental freedoms, including the rights to equality before the law and to be free from discrimination, to participate in public affairs, freedoms of expression, peaceful assembly, association as well as freedom of the media, the right to property, the right to respect for private and family life, as well as principles pertaining to conflict of interest, anti-corruption, democratic governance and legitimacy, in general. In addition, some of the provisions raise concerns over the protection of personal data as provided by personal data protection standards.

The Draft Law also gives the government excessive influence over the process, including the initiation of the procedure through submissions but also as a decision-making and oversight authority, without clarity as to its powers and criteria guiding

the verification and assessment process. In particular, there appears to be a conflict of interest between the submitting party, including the Cabinet of Ministers, and the decision-making body. The procedure for recognizing a person as an "oligarch" is not detailed and does not provide for a due process in this endeavour, including by ensuring judicial oversight and effective legal redress. Strong substantive and procedural guarantees would be necessary to ensure respect for the rule of law and human rights.

In light of all the above concerns, ODIHR recommends to reconsider the Draft Law's approach of targeting so-called "oligarchs" and instead pursue more holistic, structural and systemic reforms to reach the intended goal in the long run.

Given that the legislative work is still ongoing, ODIHR would like to draw attention of the legal drafters to the main concerns and deficiencies of the Draft Law, and offers recommendations listed below, in addition to others included in the text of the Opinion:

A. Instead of targeting "oligarchs", to consider more comprehensive structural and institutional reforms, including by implementing earlier recommendations made by ODIHR and other regional and international bodies, such as in relation to:
   - preventing and combatting corruption, including addressing high level corruption cases and strengthening the independence and powers of relevant anti-corruption bodies;
   - enhancing the legal and institutional framework on conflict of interests and on political party and election campaign financing;
   - ensuring transparency of and participation in public decision-making and law-making;
   - enhancing the effectiveness and efficiency of the existing oversight bodies/mechanisms and as appropriate, guarantees of their institutional independence; and
   - pursuing further reforms to enhance the independence, impartiality and integrity of the judiciary and of the prosecution service; [paras. 18-21]
B. To exclude a possibility of retroactive application of the Law, which is currently suggested in Article 11 of the Draft Law; [para. 27]
C. To avoid the use of vague and/or broad terms, such as in the definition of "flawed business reputation" or in relation to the "financing of the activities of a political party, political campaigning, or holding of rallies or demonstrations with political demand"; [paras. 33-35]
D. To ensure that the authority competent to assess and respond to potentially excessive influence of vested interests in political and public life is an independent institution, not under the potential influence of the executive, while specifying the means and criteria that will be employed to assess the risks, to ensure transparency of the process but also compliance with personal data protection standards; [para. 42]
E. To substantially revisit the procedure for adopting a decision designating a person as an "oligarch" due to its inherent deficiency, lack of procedural and substantive safeguards, in particular since:
   - it fails to specify, in clear and accessible terms, the procedure to be followed for collecting, sharing/processing, storing, and destroying collected

data/information regarding an individual for the purpose of designation as an "oligarch", and does not grant explicit legal authorization to any specific official or body to collect such data for that purpose; [paras. 44 and 73]

- it contains no requirement that all submissions be thoroughly substantiated, in compliance with personal data protection standards; [para. 44]
- it lacks clarifications about the rules of evidence applicable in the context of assessment of the submissions, especially in relation to the "inadequate discharge of tax obligations" or "substantial and/or systematic violations by the person of the requirements of the laws and regulations" for which only a decision of a court or competent public authority should be used as an element of proof; [para. 43]
- no adequate time is provided for each stage of the process, which would be necessary to ensure that the individual subject to the procedure has enough time to meaningfully prepare for the meeting where the relevant decision is adopted, also ensuring that his/her right to be heard is guaranteed; [para. 47]
- the possibility of judicial appeal of the said decision should be provided, or if such a possibility already exists, a cross-reference to applicable legislation included, while ensuring that this appeal is suspensive and that any information implying that a person may be exercising excessive influence over political and public life should only be published after a final decision is reached, and after all legal remedies are exhausted; [para. 48]

F. To exclude any complete ban on providing financial or in-kind support to political parties, electoral campaigning and financing any political campaigning, or holding of rallies or demonstrations with political demands, which is currently envisaged in Article 7 of the Draft Law, in order to avert undue restrictions on the rights to freedoms of association, peaceful assembly, expression and political participation; [paras. 60-61]

G. To substantially reconsider the obligations and consequences linked to the designation of a person as an "oligarch" with a view to ensure compliance with the right to respect for private and family life, in particular since:

- the publication of personal information (on "oligarchs") on the website of the government and in the public Register may fail to satisfy requirements of necessity and proportionality and unduly impact the right to privacy; [para. 75]
- the obligation to submit assets declarations may not appear justified and necessary, in particular since there may be alternative ways to verify these assets and assess whether they may be linked to potential acts of corruption or commission of other criminal offences; [para. 76]
- the reporting obligations imposed on public servants appear cumbersome, and rather vague and broad and could be addressed by alternative means, such as lobbying reporting; [para. 78] and

H. Whatever the approach followed, the authorities are encouraged to ensure that any legislative and non-legislative proposals aimed at reducing the excessive influence of vested interests in political and public life is subject to a transparent and inclusive process that involves meaningful consultations with all relevant stakeholders, including with representatives of various political parties, civil

society organizations, academia, throughout the policy- and law-making process. [para. 85]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

TABLE OF CONTENT

Annex: Draft Law of Georgia on De-Oligarchization (as of November 2022)

I. INTRODUCTION

1. On 1 December 2022, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Speaker of the Parliament of Georgia for a legal review of the Draft Law of Georgia on De-oligarchization (hereinafter "Draft Law"). ODIHR responded to this request, confirming its readiness to prepare a legal opinion on the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments.
2. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its general mandate to assist OSCE participating States in the implementation of their OSCE human dimension commitments.[1]

II. SCOPE OF THE OPINION

3. The scope of this Opinion covers only the Draft Law submitted for review, primarily focusing on the most concerning issues relating to the Draft Law's compliance with international human rights standards and OSCE human dimension commitments. Therefore, this legal review does not constitute a full and comprehensive review of the legal and institutional framework that may be used to prevent, reduce or eliminate the phenomenon of excessive influence of vested interests in economic, political, and public life and related issues in Georgia.
4. The ensuing legal analysis is based on international obligations and regional standards, norms, and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practice from other OSCE participating States in this field.
5. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[2] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[3] and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion analyses the potential different impact of the proposed amendments on women and men, and also integrates, as appropriate, a diversity perspective.
6. This Opinion is based on an English translation of the Draft Law provided by the requesting authority, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Georgian language. In case of discrepancies, the English version shall prevail.
7. In view of the above, ODIHR stresses that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

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1 See *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]".*

2 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) adopted by General Assembly resolution 34/180 on 18 December 1979. Georgia ratified CEDAW on 26 October 1994.

3 See the *OSCE Action Plan for the Promotion of Gender Equality,* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

8. The Opinion has been prepared in light of international human rights and democratic governance obligations, as well as OSCE human dimension commitments. There are no international norms, or commitments, directly related to combatting "oligarchs" or regulating so-called "de-oligarchization" nor universally agreed legal concept of "oligarch". At the same time, the Draft Law has the potential to unduly impact the exercise of a whole range of human rights and fundamental freedoms, as well as principles pertaining to conflict of interest, anti-corruption, and democratic legitimacy, in general. Consequently, the ensuing analysis is based on international obligations, standards, and recommendations related to these issues.

9. The United Nations (UN) International Covenant on Civil and Political Rights (ICCPR)[4] enshrines several human rights that are of relevance in the context of the Opinion, including the rights to participate in public affairs (Article 25), equality before the law and to be free from discrimination (Article 26), to freedoms of expression, peaceful assembly and association (Articles 19, 21 and 22 respectively), and the right to respect for private and family life (Article 17), among others. According to the ICCPR, interferences with these rights can only be justified if they are prescribed by law, pursue a legitimate aim, are necessary in a democratic society and non-discriminatory. Article 2 also ensures that rights recognized in the ICCPR will be respected without discrimination and be available to everyone within the territory, along with the right to an effective remedy.

10. Relevant legally binding documents at the international level also include the UN Convention against Corruption (UNCAC), which covers, among other issues, preventive measures for corruption. Pursuant to its Article 5 (1), each State Party is obliged to "*develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability*." Article 7.4 requires States Parties to "*endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest*" in accordance with the fundamental principles of its national legislation.[5] Article 8 provides that States Parties "*shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system*" (paragraph 1) and "*shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions*" (paragraph 2).

11. The European Convention on Human Rights (ECHR) sets standards regarding the rights to freedoms of expression, peaceful assembly and of association (Articles 10 and 11), to respect for private and family life (Article 8), protection of property (Protocol no. 1 to the ECHR) as well as prohibits discrimination on any ground (Article 14 and Protocol no. 12 to the ECHR).[6] The Council of Europe's Criminal Law Convention on Corruption

[4] *UN International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Georgia ratified the ICCPR on 3 May 1994.

[5] *United Nations Convention against Corruption* (UNCAC), adopted 31 October 2003, entered into force 14 December 2005. Georgia ratified the UNCAC on 4 November 2008.

[6] *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) entered into force on 3 September 1953. Georgia ratified the ECHR on 20 May 1999 and its Protocols nos. 1 and 12 on 7 June 2002 and 15 June 2001, respectively.

is also of relevance to the issues covered by this Opinion.[7] A definition of "conflict of interest" can be found in Article 8 paragraph 1 of the Council of Europe's Model Code of Conduct for Public Officials, which is annexed to Council of Europe Recommendation No. R (2000)10 on codes of conduct for public officials.[8] Article 8 states that a public official should not allow for private interests to conflict with their official duties. According to the same provision, conflict of interest can be real, potential and apparent and the public official has to avoid all forms of conflict of interest. These concepts are mirrored in Article 13.1 of the same Model Code that describes *"[c]onflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties*."

12. As an OSCE participating State, Georgia has also undertaken to adhere to key OSCE human dimension commitments, including those pertaining to a pluralistic democracy, the rule of law and democratic institutions;[9] the independence of the judiciary;[10] the fulfilment of international obligations;[11] the rights to a fair trial and to an effective remedy;[12] the rights to freedoms of peaceful assembly and of association;[13] the right to effective participation in public and political affairs;[14] tolerance and non-discrimination;[15] and gender equality,[16] among others. The 1990 OSCE Copenhagen Document specifically recognizes that "*a vigorous democracy depends on the existence as an integral part of national life of democratic values and practices as well as an extensive range of democratic institutions*".

13. The fight against corruption is also an integral part of commitments undertaken by OSCE participating States, as underlined, for example, by the Maastricht Document of 2003 and in the 2012 OSCE Ministerial Council's Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism.[17] In the 1999 Istanbul Document, the OSCE participating States followed up with the pledge to strengthen their efforts to "*promote good government practices and public integrity*" in a concerted effort to fight corruption.[18]

14. Other applicable guidance and recommendations can be found in recommendations of the UN, the Council of Europe and the OSCE. At the international level, these include

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7 Council of Europe, *Criminal Law Convention on Corruption*, adopted on 27 January 1999. Georgia ratified the Convention on 10 January 2008.

8 See *Council of Europe Recommendation No. R (2000)10* on codes of conduct for public officials, 11 May 2000.

9 See in particular the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June - 29 July 1990) (hereinafter "OSCE Copenhagen Document (1990)", para. 5; the *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (1991) (hereinafter "OSCE Moscow Document (1991)"), paras. 19 and 20; and OSCE *Ministerial Council Decision No. 12/05 on Upholding human Rights and the Rule of Law in Criminal Justice Systems*, Ljubljana Ministerial Council Meeting on 6 December 2005.

10 See ibid. par 5 (OSCE Copenhagen Document (1990)); and paras. 19 and 20 (OSCE Moscow Document (1991)). See also Document of the Istanbul Meeting (19 November 1999), *Charter for European Security: IV. Our Common Instruments*, para. 45. See also ODIHR *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010).

11 See e.g., Principle X of the *Declaration on Principles Guiding Relations between Participating States*, Helsinki 1975; and OSCE Ministerial Council *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*, Helsinki Ministerial Council Meeting on 5 December 2005.

12 See in particular par 13.9 of the OSCE Vienna Document (1989); and OSCE Copenhagen Document (1990), paras. 5.10, 5.11, 5.21, 11 and 40.5.

13 OSCE Copenhagen Document (1990), paras. 9.2 and 9.3.

14 OSCE Copenhagen Document (1990), para. 7.1. See also OSCE commitments related to the effective and full participation of women, persons belonging to national minorities, Roma and Sinti and persons with disabilities; see e.g., 2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, para. 88; Helsinki 1992, para. 24; OSCE Moscow Document (1991), paras. 40.8 and 41.3, OSCE Copenhagen Document (1990), para. 35. See also the *Lund Recommendations on the Effective Participation of Minorities in Public Life* of 1999.

15 See *OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination*, Maastricht Ministerial Council Meeting on 2 December 2003, paras. 6 and 9.

16 See *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004).

17 See *the Final Document of the Eleventh Meeting of the OSCE Ministerial Council, Maastricht*, 1-2 December 2003 and *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 7 December 2012.

18 See *the 1999 Istanbul Document.*

General Comment No. 25 of the UN Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service, and the CEDAW General Recommendation No. 23: Political and Public Life.[19] With respect to anti-corruption agencies or authorities specifically, the Jakarta Statement on Principles for Anti-Corruption Agencies (Jakarta Principles), its 2020 Colombo Commentary and the Anti-Corruption Authority Standards and Ten Guiding Principles against Corruption of the European Partners against Corruption, an independent forum for practitioners aiming to prevent and combat corruption, are also useful reference documents.[20] Evaluations and recommendations of the Council of Europe Group of States against Corruption (GRECO), as well as the Principles against Corruption are also of relevance.[21] Lastly, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) fifth-round mutual evaluation report could serve as guidance for measuring implementation of Georgia's commitments for transparency and beneficial ownership of legal persons and legal arrangements.[22] The importance of mainstreaming gender into anti-corruption efforts should also be underlined.[23]

2. BACKGROUND AND GENERAL REMARKS

15. The Draft Law under review was initiated by the Parliamentary Working Group on De-oligarchization, created under the Legal Affairs Committee of the Parliament of Georgia with the aim to meet priorities defined by the European Commission (EC) in response to the application for integration into the European Union (EU).[24] On 17 June 2022, the EC noted that "*fighting high-level corruption and eliminating vested interests, including that of oligarchs, require further decisive actions*." As one of the preconditions for receiving candidate status, the EC recommended to "*implement the commitment of "de-oligarchization" by eliminating the excessive influence of vested interests in economic, political, and public life*".[25] However, it should be noted that the European Commission's recommendation does not necessarily require adoption of a specific law and could potentially be addressed through a variety of legislative and non-legislative measures. The Draft Law was voted in its first reading on 2 November 2022 and its second reading on 16 November 2022. On 21 March 2023, the Parliament of Georgia returned the Draft Law for reconsideration in second reading.[26]

16. In December 2022, the European Parliament reminded the authorities of "*addressing the excessive influence of vested interests, notably of the oligarch and former Prime Minister Bidzina Ivanishvili, in a systemic way through structural and regulatory reforms in various areas of the country's political, economic and public life […] and reiterated] its call on the Council and democratic partners to take appropriate measures, including*

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19 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Georgia ratified CEDAW on 26 October 1994.

20 See *the Colombo Commentary to the Jakarta Statement on Principles for Anti-Corruption Agencies*.

21 See *GRECO's Twenty Guiding Principles against Corruption (Resolution (97) 24)*.

22 See Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), Anti-money laundering and counter-terrorist financing measures – *Georgia - Fifth Round Mutual Evaluation Report (2020)*, especially Recommendations 24 and 25.

23 See OSCE, *Discussion Paper on Gender and Corruption* (9 December 2021).

24 Other countries aiming to join the European Union have developed or adopted legislation aimed at addressing "the excessive influence of vested interests in economic, political and public life", such as Moldova and Ukraine. See, in this respect, Venice Commission, *Republic of Moldova - Interim opinion on the Draft Law on limiting excessive economic and political influence in public life (de-oligarchisation)*, CDL-AD(2023)010-e, 13 March 2023; and *Georgia - Interim opinion on the draft law on de-oligarchisation*, CDL-AD(2023)009-e, 13 March 2023.

25 See *Opinion on the EU membership application by Georgia*, 17 June 2022. See also GRECO's *Second Compliance Report* (2021) and *Addendum* (2022) pertaining to Georgia.

26 See <Parliament to Reconsider Bill on Deoligarchization in II Reading - Parliament of Georgia>.

imposing personal sanctions on Ivanishvili and all those individuals enabling and responsible for the deterioration of the democratic political process."[27]

17. As an initial general remark, ODIHR would like to acknowledge the government's efforts to meet the EU preconditions and the Draft Law's stated objective and attempt to reduce the excessive influence of vested interests in economic, political, and public life, as this phenomenon unquestionably undermines democracy and the rule of law. Although the aim of the Draft Law is clear, the question arises whether the path chosen is really the most adequate and effective way to achieve the goal pursued. Although the Draft Law aims at applying to certain categories of persons generally and in the abstract, in practice, it aims to target a few specific individuals to impose on them a series of restrictions and obligations.

18. **Instead of attempting to define and target so-called "oligarchs", which appears challenging if not impossible given the inherent vagueness of the term and lack of universally agreed definition** (see Sub-Section 3 below), **it would appear more effective and human-rights compliant to pursue a more holistic, structural and systemic reform to prevent, reduce or eliminate the excessive influence of vested interests in economic, political, and public life**.

19. This reform could consist of **enhancing the overall legal and institutional framework in the fields of anti-corruption, conflict of interest, public integrity, lobbying legislation, political party and electoral legislation, anti-monopoly and competition legislation, anti-money laundering, corporate governance reform, banking and taxation regulations, enhancing public openness, transparency and accountability, gender equality and women participation in political life etc**. In many of these fields, guidance and recommendations at the international and regional levels exist to devise legislation in compliance with international human rights standards and OSCE human dimension commitments.

20. Such comprehensive reforms should also **aim at implementing earlier recommendations made by ODIHR and other regional and international bodies, including the Organisation for Economic Co-operation and Development, GRECO and MONEYVAL, that remain unaddressed. This would require adopting a series of measures in relation to preventing and combatting corruption,[28] including addressing high level corruption cases and strengthening the independence and powers of the anti-corruption body, enhancing the legal and institutional framework on conflict of interests[29] and on political party and election campaign financing,[30] improving corporate governance and transparency of beneficial**

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[27] See the *Annual implementing report on the EU association agreement with Georgia*, European Parliament resolution of 14 December 2022 on the implementation of the EU Association Agreement with Georgia (2021/2236(INI)). On 15 February 2023, *in its resolution*, the European Parliament reiterated "its call on the Council and democratic partners to consider imposing sanctions on Mr. Ivanishvili for his role in 'the deterioration of the political process in Georgia'".

[28] See OECD, Anti-Corruption Reforms in Georgia: Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan | (oecd-ilibrary.org) (2022). See also GRECO, Fourth Evaluation Round - Corruption prevention in respect of members of parliament, judges and prosecutors, *Addendum to the Second Compliance Report* for Georgia (13 July 2022); and Third Evaluation Round – *Second Addendum to the Second Compliant Report on Georgia* (Incrimination and Transparency of Party Funding) (19 December 2018).

[29] See in particular OECD, Anti-Corruption Reforms in Georgia: Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan | READ online (oecd-ilibrary.org) (2022), Section 2.

[30] See ODIHR, *Georgia - Local Elections - ODIHR Election Observation Mission Final Report (2021)*, para. 13 on p. 37, recommending to enhance the legal and institutional framework, including by ensuring that anonymous in-kind donations and third party campaigning are properly identified and accounted for, followed by effective actions taken to enforce the law. See also GRECO, Third Evaluation Round – *Second Addendum to the Second Compliant Report on Georgia* (Incrimination and Transparency of Party Funding) (19 December 2018), noting that some of its recommendations remain partially unaddressed, including with regard to a more uniform and consistent legal framework for political finance (para. 11), the need to enhance financial reporting requirements applicable to persons with "declared electoral goals" (para. 16) and to strengthen the institutional and legal framework pertaining to the monitoring of any financing of political parties and campaigns of electoral subjects, along with the imposition of effective, proportionate and dissuasive sanctions (paras. 31 and 36).

ownership of legal persons,[31] enhancing transparency of and public participation in public decision-making and law-making,[32] as well as judicial and prosecutorial reform,[33] among others. At the same time, any such comprehensive reform should also aim to ensure that the relevant, competent public oversight bodies and institutions present, as appropriate, the necessary guarantees of institutional independence, and are equipped with the indispensable investigative and sanctioning powers as well as adequate financial, human, and technical resources, and are trained to effectively and efficiently implement their mandate.[34]

21. An independent and impartial judiciary is also central to make these policies effective, along with adequate procedural and substantive safeguards and effective legal remedies, to minimize the risk of abuse. Therefore, the above-mentioned areas for reform should also **be accompanied with further judicial reform to strengthen the independence, impartiality and integrity of the judiciary** (on this matter, please see 2023 Opinion on the Draft Amendments to the Legal Framework on the Judiciary of Georgia).[35]

22. Finally, such a comprehensive reform should be undertaken based on a proper impact assessment while ensuring that the law-making process is open, transparent, inclusive, and participatory (see Sub-Section 6 below).

23. ODIHR remains at the disposal of the authorities for any further assistance that they may require should they want to pursue such a more holistic, structural, and systemic reform, including by sharing examples of good practices and offering legal analysis of the relevant legislation.

RECOMMENDATION A.

To consider more comprehensive structural and institutional reforms with a view to limit the excessive influence of vested interests in economic, political, and public life, including by implementing earlier recommendations made by ODIHR and other regional and international bodies, such as in relation to:

- preventing and combatting corruption, including addressing high level corruption cases and strengthening the independence and powers of the anti-corruption body;
- enhancing the legal and institutional framework on conflict of interests and on political party and election campaign financing;

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[31] See especially MONEYVAL, Anti-money laundering and counter-terrorist financing measures – *Georgia - Fifth Round Mutual Evaluation Report (2020)*, especially Recommendations 24 and 25; and OECD, Anti-Corruption Reforms in Georgia: Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan | READ online (oecd-ilibrary.org) (2022), Section 8 on Business Integrity.

[32] See GRECO, Fourth Evaluation Round - Corruption prevention in respect of members of parliament, judges and prosecutors, *Addendum to the Second Compliance Report* for Georgia (13 July 2022), paras. 11-12. See also, for reference, ODIHR *Assessment of the Legislative Process in Georgia* (2015).

[33] See ODIHR, *Opinion on the Draft Amendments to the Legal Framework on the Judiciary of Georgia* (15 March 2023); and *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia* (17 April 2019) in English and in Georgian. See also the Venice Commission's Opinions adopted between 2019 and 2023, including the *Opinion on the December 2021 amendments of the Organic Law on Common Courts* (20 June 2022); *Urgent Opinion on the amendments to the Organic Law on Common Courts* (2 July 2021); *Opinion on the draft Organic Law amending the Organic Law on Common Courts* (8 October 2020); and *Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia* (16 April 2019) as well as *Follow-Up Opinion* on these four previous opinions concerning the Organic Law on Common Courts (14 March 2023). See also GRECO, Fourth Evaluation Round - Corruption prevention in respect of members of parliament, judges and prosecutors, *Addendum to the Second Compliance Report* for Georgia (13 July 2022).

[34] In this respect, see in particular, ODIHR, *Georgia - Local Elections - ODIHR Election Observation Mission Final Report (2021)*, paras. 4 and 10 on p. 36, recommending to adopt, in relation to election campaign finance oversight, "*further measure to enhance the independence of the oversight body and that the oversight body is fully mandated and resourced to monitor campaign spending and thoroughly review campaign finance reports*" as well as to "*strengthen the impartiality of and public confidence in the entire election administration*". See also OECD, Anti-Corruption Reforms in Georgia: Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan | (oecd-ilibrary.org) (2022).

[35] See ODIHR, *Opinion on the Draft Amendments to the Legal Framework on the Judiciary of Georgia* (15 March 2023); and *Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia* (17 April 2019) in English and in Georgian.

- ensuring transparency of and participation in public decision-making and law-making;
- enhancing the effectiveness and efficiency of the existing oversight bodies/mechanisms and as appropriate, guarantees of their institutional independence; and
- pursuing further reforms to enhance the independence, impartiality and integrity of the judiciary and of the prosecution service.

3. SCOPE OF APPLICATION OF THE DRAFT LAW AND DEFINITIONS

3.1. Scope of Application and Enforcement

24. The Draft Law aims to "*define legal and organizational grounds for the functioning of a system to prevent threats to national security associated with excessive influence by persons who wield significant economic and political weights in public life (oligarchs)*," as well as "*to overcome the conflict of interest caused by the merger of politicians, media, and big business, preventing the use of political power to increase one's own political capital, ensure Georgia's national security in economic, political, and informational spheres and protect constitutional rights of a citizen, democracy and state sovereignty*."[36] Overall, rules on conflict of interest that pertain to access to political power, aim to help create a more level playing field to electoral contestants and political actors[37] and more generally, to enhance transparency and accountability of the public sector, which is an essential component of good public governance. The concentration of power through the merger of the private (media and "big business") and public (elected officials holding public executive and legislative offices) spheres raises concerns with regard to democratic and rule of law principles, as well as the protection of constitutional rights and exercise of fundamental freedoms of individuals. At the same time, measures to regulate conflict of interest should not unduly limit the political and other rights of citizens upon whom such measures are imposed.[38]

25. An important part of the Draft Law is dedicated to defining key terms, including providing a definition and criteria for the recognition of a person as an "oligarch" (Articles 1 and 2, read together with Articles 3, 4, and 10 that define the notion of "involvement in political life", "significant influence on mass media" and "impeccable business reputation" respectively). Other provisions deal with the legal implications of recognizing a person as an "oligarch" (Articles 5 and 7); entry on and/or removal from a Register of oligarchs (Articles 6 and 9); reporting obligations for "public servants" regarding contact with an "oligarch" and their representatives (Article 8); and transitory and final provisions (Articles 11 and 12).

26. According to Article 12, the Draft Law shall come into force on 1 June 2023 and shall cease on 1 June 2033. Article 11.2, which is effective from the moment of promulgation, provides that "*relevant authorities and officials must ensure the adoption/issuance of subordinate laws necessary for the implementation of this law and the compliance of appropriate subordinate laws with this law within 3 months from the enactment of this*

[36] As stated in the Preamble of *the Draft Law*.

[37] See e.g., ODIHR, *Georgia - Local Elections - ODIHR Election Observation Mission Final Report (2021)*, p. 17, which notes: "*Significant imbalances in the campaign income and expenditure contributed to an unlevel playing field. Several ODIHR EOM interlocutors noted that parties have limited grassroots funding and tend to rely on big corporate donors when in office*."

[38] Paragraph 16 of the *1996 General Comment 25 on article 25 of the ICCPR* provides that "Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph [Article 25 ICCPR] (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures".

law." It is not clear from the reasoning attached to the Draft Law why such a "sunset" clause is introduced and there is no explanation justifying its duration. There is also no reference to any process of evaluation. While it is rather uncommon to include provisions limiting the validity of general laws for a specific time, such "sunset" clauses are for instance used in laws adopted in emergency situations in which more severe limitation or even derogation from certain fundamental rights and freedoms may be allowed, to ensure that all related legal acts and measures taken during that period and with them the associated restrictions on fundamental rights and freedoms would cease to have effect at the end of the emergency. Some other laws are adopted for a certain period, requiring them to be assessed once this period has ended; they are only renewed once it has been determined that they are still needed. It is however, questionable why this Draft Law includes a "sunset" clause, especially without referring to any mechanism to evaluate whether it is still necessary after some time. This provision may be an indication that given the negative and far-reaching impact this legislation may have, which put into question its very *raison d'être*, it should be limited in time. However, the stated goal of the Draft Law cannot be separated from the necessity to undertake systematic, structural, and regulatory reforms, highlighted by the EC, which would require a longer commitment. This is without the prejudice to the concerns expressed above in relation to the personal approach of targeting "oligarchs" versus a more holistic and structural approach (see Recommendation A in this respect). **In any case, a consistent monitoring and evaluation mechanism of the implementation of a law and its impact, including human rights impact, should be envisaged in any legislation, especially when it substantially limits human rights and fundamental freedoms** (see also Sub-Section 6 below).

27. In addition, Article 11.1 introduces an obligation for public servants to report any contact with a so-called "oligarch" that occurred between the adoption and the enactment of the Draft Law. Normally, adopted laws should have legal consequences from the day they enter into force. Retroactive application of a law may go counter to the principle of legality which entails that legislation should be foreseeable and an average person should be able to predict, at all times and to a degree that is reasonable in the circumstances, what kind of consequences a given action may entail.[39] In principle, legislation should not have retroactive effect and exceptions to this rule should be clearly outlined in legislation, strictly limited to compelling public-interest reasons and only if in conformity with the principle of proportionality.[40] Retroactive application of the law, as suggested by Article 11.1, especially if read together with Article 8.6 of the Draft Law, which provides for disciplinary liability for failure to report such contact, should be avoided. **It is recommended to exclude provisions relating to the retroactive application in future legislative initiatives.**

RECOMMENDATION B.

To exclude a possibility of retroactive application of the Law, which is currently suggested by Article 11 of the Draft Law.

[39] See e.g., Venice Commission, *Rule of Law Checklist*, para. 58. See also European court of Human Rights (ECtHR). *The Sunday Times v. the United Kingdom (No. 1),* Application no. 6538/74, para. 49, where the Court ruled that a law should be "*formulated with sufficient precision to enable the citizen to regulate [one's] conduct […] [to] be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*."

[40] See Venice Commission, *Rule of Law Checklist*, para. 62. For the criminal proceedings it is also recognized, under Article 7.2 of *the European Convention on Human Rights* that *"this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations*." See also, ECtHR, *Scoppola v. Italy (No. 2) [GC],* Application no. 10249/03, 17 September 2009.

3.2. Definitions

28. As mentioned above, there are no international norms, or OSCE commitments, directly related to combatting so-called "oligarchs" or regulating "de-oligarchization" and hence no internationally agreed definition of "oligarch" exists. However, as a standing principle of legal certainty, laws must be clear, precise, and foreseeable in their application so that individuals may ascertain unequivocally which rights and obligations apply to them and regulate their conduct accordingly.[41] This also implies that the definitions in the Draft Law be compliant with this principle.

29. The preamble of the Draft Law defines an "oligarch" as someone who "wields significant economic and political weight in public life". Article 2.1 of the Draft Law further conditions the description of an "oligarch" as someone who matches at least three of the following four criteria: (1) involvement in political life (further defined in Article 3); (2) exerting significant influence on mass media (further defined in Article 4); (3) being the ultimate beneficial owner of companies in a monopolistic position, and maintaining or strengthening such position within one consecutive year; and (4) confirmation that the total value of their assets, personal and companies' combined, exceeds 1 million subsistence minimums.[42]

30. It is questionable that the above-mentioned criteria used to define an "oligarch", which individually do not *per se* relate to any illegal behaviour or characteristic, may, when combined together, trigger the limitations to human rights and fundamental freedoms, and other negative consequences envisaged in the Draft Law, and ultimately potential stigmatization. It is also unclear why specifically such criteria have been chosen to define individuals with potentially excessive and vested influence over political or public life.

31. Further, the combination of three of the four criteria could mean that an individual who is not even involved in political life (first criteria) could still qualify as an "oligarch" and be subject to the restrictions to human rights and other negative consequences envisaged in the Draft Law, which appears hardly justifiable.

32. Moreover, the fulfilment of three of the four criteria are not possible without fulfilling either criterion (3) on ownership of companies in a monopolistic position, or criterion (4) on personal wealth, which are both related to the property of the individual. Hence, it is the property status of a person, which is the decisive characteristic in recognizing an individual as an "oligarch", and leads to the negative consequences contemplated in the Draft Law. This means that individuals may be discriminated on the basis of their property status which is not compliant with international standards.[43] As mentioned, this is even regardless whether they participate actively in public or political life.

33. Articles 2, 3, and 4 also include some wording that is inherently vague and/or broad. For instance, the explanatory Note included under Article 3 specifies what is meant by "*financing of the activities of a political party, political campaigning, or holding of rallies or demonstrations with political demand*", which could potentially apply to a very broad category of persons,[44] who would thereby be considered as being "involved in

[41] See e.g., ECtHR. *The Sunday Times v. the United Kingdom (No. 1),* Application no. 6538/74, para. 49. See also Venice Commission, *Rule of Law Checklist*, para. 58.

[42] For February 2023, the Subsistence Minimum amounts to 256.4 GEL (see <Subsistence Minimum - National Statistics Office of Georgia (geostat.ge)>, corresponding to approximately 92 EUR.

[43] See, in particular, Article 26 of the ICCPR, Article 14 of the ECHR read together with Protocol 12 to the ECHR, which refer to "property" as a prohibited ground for discrimination.

[44] The Note under Article 3 of the Draft Law refers to "paying money, performing work, providing goods or services for the benefit of participants in political campaigning, rallies or demonstrations with political demands or of their family members", "otherwise providing organisational and technical support for political campaigning, rallies or demonstrations with political demands", "affiliated persons", which could apply to a very broad category of persons, such as any person giving even the smallest donation to a political party, a technician hired to set the scene for a political rally, an owner of a restaurant selling food and drinks to participants of a political rally, a guard hired to take care of a security at a political rally, an editor of a newspaper publishing paid invitation to a political rally.

political life". This could have a chilling effect on individuals, legal entities or businesses who for fear of being categorized as being "involved in political life" may refuse or stop providing services or goods, or any form of support or simply being involved in whatever manner with the activities of a political party, political rally, political campaigning or even any peaceful assembly as many of them could potentially be linked to so-called "political demand" if understood broadly. Hence, this also touches the very core of the exercise of the rights to political participation as well as to freedoms of association, peaceful assembly and expression. The broad definition of involvement in political life may also in turn potentially incentivize other or new forms of "shadow influence" over politics, rendering even harder the ability to identify potential excessive sources of influence. Overall, the proposed criteria may not be sufficient or adequate to identify wealthy individuals capable of unduly influencing political life or public decision-making processes.

34. Similarly, the definition of "significant influence on mass media" in Article 4 refers to "persons who lack impeccable business reputation" with "impeccable business reputation" being further defined in Article 10 of the Draft Law.[45] Article 10(2), which defined what is meant by a "flawed business reputation" includes some vague and/or broad terms, such as the reference to the mere "intention to acquire" a mass medium (Article 10(2)(f)), without any mention of objectively recognisable actions of the intent holder. The mere intent should not be enough to justify the restrictions of fundamental rights contemplated by the Draft Law.[46] It is also not clear what a "substantial" or a "systematic" violation of the legislation and regulations mentioned in Article 10(2)(g) constitutes. Article 10(2)(a) also generally refers to "*a conviction*" without mention of the types of offences and sanctions meaning that even the mildest sanction/conviction for the commission of minor non-violent criminal offence would be enough. Article 10(2)(b) refers to the imposition of sanctions, without specifying the types of (serious) offences, by other countries or international organizations, which does not prevent the risk of malicious imposition of sanctions. Article 10(2)(c) of the Draft Law also refers to individuals on the "*list of persons associated with terrorist activities or subjected to international sanctions".* In previous opinions, not related to legislation of Georgia, ODIHR has raised concerns regarding the lack of legal certainty as to the definition of "terrorism" and the listing process (such as lack of clear and precise criteria for being listed as a terrorist organization and the absence of access to an effective remedy and due process guarantees when seeking removal from the list).[47] In light of the foregoing, the definition of "flawed business reputation" as provided **in Article 10(2) a, b, c, f, and g fails to comply with the principle of legal certainty and may lead to potential arbitrary or abusive application.**

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[45] Article 10(2) refers to the criteria of a "flawed business reputation of a natural person", including: "*a) having a conviction that has been neither canceled nor cleared in the manner prescribed by law; b) imposition by Georgia, foreign states (other than states carrying out armed aggression against Georgia), intergovernmental associations or international organisations of sanctions against the person — while the sanctions are in force and three years after they have been lifted or expired; c) inclusion of the person in the list of persons associated with terrorist activities or subjected to international sanctions — while the person is on the list and ten years after having been struck off the list; d) deprivation of the right to occupy certain positions or to engage in certain activities under a court decision — while the sentence is in force; e) inadequate discharge by the person of obligations to pay taxes, fees or make other mandatory payments where the total unpaid amount is equal to or exceeds 100 minimum monthly wages established by the laws and regulations of Georgia for the period during which the violation was committed, or an equivalent thereof in foreign currency — while the violation continues and three years after it has ceased; f) acquisition of (intention to acquire) a mass medium at a price that is significantly lower than the market price, or with the funds whose origin is not corroborated by documentary evidence; g) substantial and/or systematic violations by the person of the requirements of the laws and regulations on mass media, banking, financial, currency, tax laws and regulations, laws and regulations on financial monitoring, laws, and regulations on securities, joint-stock companies, and the stock market*".

[46] As provided by paragraph 18 of the *1994 OSCE Budapest Document*, "[t]he participating States emphasize that all action by public authorities must be consistent with the rule of law, thus guaranteeing legal security for the individual."

[47] See ODIHR, *Urgent Interim Opinion on the Draft Law on Non-Profit Non-Governmental Organizations and Draft Amendments on "Foreign Representatives"* (12 December 2022), para. 39. See also UN Special Rapporteur on counter-terrorism, *2005 Report*, UN Doc. E/CN.4/2006/98, pars 26-28; *2010 Report on Ten areas of best practices in countering terrorism*, UN Doc. A/HRC/16/51 (2010), Practice 9.

35. In light of the foregoing, **some of the terms used to define that a person is "involved in political life" or is significantly influencing the mass media, lack the required precision, certainty, and foreseeability of a law. Such vague and/or broad terms should be avoided in the legislation at all times, the definitions should be more strictly circumscribed and clearly worded.** As they stand, the proposed definitions may potentially be subject to diverging and arbitrary interpretation and application by public authorities, thereby presenting a real risk of being misused as a political instrument. This could also contribute to an unequal application of the law by subjecting some individuals and excluding recognition for others, as such stigmatizing persons based on personal and political perceptions.

RECOMMENDATION C.

To avoid the use of vague and/or broad terms, such as in the definition of "flawed business reputation" or in relation to the "financing of the activities of a political party, political campaigning, or holding of rallies or demonstrations with political demand".

4. Procedure for Recognizing an Individual as an "Oligarch" and Consequences

36. Article 5 describes the procedure for recognizing an individual as an "oligarch" and the competent authorities in charge of making submissions to initiate the procedure and of adopting the decision designating a person as an "oligarch". Articles 6 and 7 of the Draft Law detail the consequences of being designated as an "oligarch", including:

- the inclusion in a public register within three days from the relevant decision (Article 6);
- the prohibition to make donations[48] in support of political parties, to the election funds of candidates (other than to their own election fund), and political parties during the electoral process (Article 7(1)(a)) and to finance "any political campaigning, or holding of rallies or demonstrations with political demands" (Article 7(1)(c));
- the prohibition of buying (or being a buyer's beneficiary) "in the process of privatisation of large-scale privatisation items" (Article 7(1)(b)); and
- the obligation to submit an asset declaration as required by the Law of Georgia on Prevention of Corruption (Article 7(2)).

4.1. Responsible Authorities

37. Under Article 5 of the Draft Law, based on submissions from the Cabinet of Ministers, members of the National Security Council, the National Bank of Georgia or the National Competition Agency, the Government of Georgia is mandated to adopt a decision on recognizing a person as an "oligarch".

38. The Cabinet of Ministers, which is eligible to make such submissions is part of the Government of Georgia, which adopts the decision. The National Security Council has

[48] Article 1(1)(a) refers to "*donations in the form of their own funds, the performance of work, provision of goods, services or cash, the performance of work, provision of goods, services by the affiliated persons and/or by the legal persons, in which such person is the ultimate beneficial owner*".

permanent members, including members of the government.[49] Hence, the composition of the bodies which are competent to make submissions partly overlaps with the composition of the decision-making body, the Government, thereby creating a potential conflict of interest between the submitting party and the decision-making authority.

39. Furthermore, the contemplated procedure bears the risk of another inherent conflict of interest as the persons potentially involved in the decision-making process may be partly the same ones potentially qualifying as "oligarchs" pursuant to the Draft Law.

40. In addition, apart from the National Bank of Georgia, the authorities eligible to make submissions are under the direct or indirect control or influence of the Prime Minister.[50] As per Article 55 of the Constitution, the Prime Minister is also the Head of the Government, which adopts the decision. Hence, the Prime Minister may have strong influence over the process of officially recognizing an individual as an "oligarch".

41. It is also not clear from the Draft Law how the assessment of whether the criteria for being designated as an "oligarch" are met will be made. Indeed, there is no requirement in Article 5(1) for a submission to be substantiated and there is no need to attach any evidence proving that someone qualifies as an "oligarch". Another question that arises is whether the authorities eligible to make submissions are authorized at all to collect the type of data that should be needed for the purposes of recognizing an individual as an "oligarch", especially the National Bank of Georgia and the National Competition Agency. **This is notwithstanding the concerns raised in terms of personal data protection standards[51] (see Sub-Section 5).**

42. To avoid perception of potential bias or conflict of interest, as well as misuse of the procedure for political purpose, international standards for an effective and human rights-compliant fight against corruption should be taken into consideration. Institutions in charge of the prevention, investigation and adjudication of corruption cases should enjoy independence and autonomy appropriate to their functions, be free from improper influence and have the effective means for gathering evidence and preserving the confidentiality of the case before a decision is taken.[52] In the fight against corruption, States shall adopt the necessary measures to ensure that persons or entities possess the required specialized knowledge and are independent, in order for them to be able to carry out their functions effectively and free from undue pressure.[53] **It is recommended that the deciding authority be an independent institution not under the influence of the executive. It is also recommended to specify the means and criteria that will be employed to assess the risks of potential excessive influence of vested interests in political and public life, to ensure transparency of the process but also compliance with personal data protection standards.**

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[49] The permanent members of the National Security Council are: the Prime-Minister of Georgia, the Minister of Defence of Georgia, the Minister of Internal Affairs of Georgia, the Minister of Foreign Affairs of Georgia, the Minister of Finance of Georgia, the Head of the State Security Service of Georgia, the Head of Intelligence Service of Georgia, the Commander of Defence Forces of Georgia and the Head of the Special State Protection Service of Georgia. If necessary, based on the decision of the Prime Minister, a person nominated and trusted by the President of Georgia or others who are not permanent members of the Council, may also be invited to a meeting of the Council. See <NATIONAL SECURITY COUNCIL (nsc.gov.ge)>.

[50] The Prime Minister of Georgia appoints and dismisses ministers, who are the members of the Cabinet of Ministers (Article 55 of the Constitution); the Prime Minister is the Chairperson of the National Security Council (see <NATIONAL SECURITY COUNCIL (nsc.gov.ge)>; pursuant to Article 16(3) of the Law of Georgia on Competition, the National Competition Agency "shall be accountable to the Parliament and Prime Minister of Georgia".

[51] Including the Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 108), 28 January 1981, ratified by Georgia on 14 December 2005; and EU General Data Protection Regulation (GDPR) – Official Legal Text (gdpr-info.eu).

[52] See Principle 3 (Twenty Guiding Principles in the Fight Against Corruption). See also *ODIHR Urgent Opinion on the Draft Amendments to the Integrity and Prevention of Corruption Act of the Republic of Slovenia*, para.23.

[53] See Principle 7 (Twenty Guiding Principles in the Fight Against Corruption). See also Articles 6.2 and 36 of the UNCAC.

RECOMMENDATION D.

To ensure that the authority competent to assess and respond to potentially excessive influence of vested interests in political and public life is an independent institution, not under the potential influence of the executive, while specifying the means and criteria that will be employed to assess the risks, to ensure transparency of the process but also compliance with personal data protection standards.

4.2. Specifications for the Submission and Inclusion in the Register

43. The types of criteria listed in support of the elements that may be taken into account to assess whether an individual fulfils three of the four criteria are straightforward when they involve, for instance, a former conviction. In other cases, however, the alleged wrongdoings such as "*inadequate discharge of tax obligations*" or "*substantial and/or systematic violations by the person of the requirements of the laws and regulations*" may not have necessary resulted in a court conviction or decision, or in a final decision by the competent public body, for which applicable judicial remedies have been exhausted. In the case of an offence of a criminal nature, the conclusion that one of the criteria is fulfilled may result in the violation of the principle of presumption of innocence. Consequently, **only a decision of a court or competent public authority should be used as substantiation to prove the "*inadequate discharge of tax obligations*" or "*substantial and/or systematic violations by the person of the requirements of the laws and regulations*".**

44. Moreover, the question may arise on what information the submission is based upon, and where and how such information is obtained, especially given that the mandates of some of the institutions involved should not *a priori* permit to gather data or information of the type required to substantiate the submissions. This may raise concerns over the right to respect for private and family life and protection of personal data as provided by personal data protection standards[54] (see also Sub-Section 5.3 below). In addition **to ensuring that the competent authorities' mandates allow them to collect the necessary information,** as mentioned above, **all submissions should be thoroughly substantiated while respecting the personal data protection standards, in particular that the submitting authority should be explicitly authorized by law to collect such information for that purpose. The rules of evidence applicable in the context of assessment of the submissions should also be clarified.**

45. According to Article 5(3), a person who is subject to the procedure to determine if she/he is to be considered an "oligarch" is invited to a meeting with a notification sent to their registered address at least 10 days prior to the meeting. The notification is published on the website of the government immediately. The same article also stipulates that a person who has received a notification or learnt about this from the website of the government, shall, within 5 days, submit clarification or supporting documents. They can also provide an oral explanation at the meeting. Failure to receive a notification or to submit clarification/documents, as well as a refusal or failure to attend such meeting, including for valid reasons, does not constitute grounds for postponing a meeting or considering the case pursuant to Article 5(5). This provision is problematic.

46. First, the timeline provided for setting a meeting and for submitting documents/clarification may be insufficient for gathering enough information and for a

[54] See Article 4 (on definition), 9 (on processing data), and 14 (on right to access) of *the EU General Data Protection Regulation*.

person concerned to prepare for and attend the meeting. The procedure for such a complex and sensitive process should necessitate an extensive undertaking to build a case, and at the same time, **to ensure that the individual has enough time to meaningfully prepare for the meeting, while ensuring that s/he has the right to be heard**. Second, the Draft Law is imprecise regarding the type of documents that a person shall submit for clarification or other supporting documents. This may result in a subjective assessment and arbitrary dismissal of arguments. Third, a valid reason for not attending a meeting should be sufficient for postponing a meeting or consideration of the case, especially given the short timeframe proposed for a notification. For example, travel reasons, health issues or other private matters should be duly considered.

47. **To ensure that the individual subject to the procedure which may lead to imposing substantive limitations on his/her rights and freedoms, should have enough time to meaningfully prepare for the meeting where relevant decision is adopted. Adequate time should be provided for each stage of the process. Thus, in particular, Article 5.5 of the Draft Law fails to provide for the postponement of the meeting due to inability to attend "for valid reason". Only an unjustified refusal should generally be allowed for the processing of the case. In any case, in light of the negative consequences of such a procedure, the right to be heard should be guaranteed by the legislation.**

48. The Draft Law does not provide the possibility for the person concerned to challenge a decision of the government on recognizing them as an "oligarch". OSCE commitments guarantee everyone's right to "*effective means of redress against administrative decisions so as to guarantee respect for fundamental rights and ensure legal integrity*".[55] This commitment also grants an "*effective means of redress against administrative regulations for individuals affected thereby*" and by providing "*the possibility for judicial review of such regulations and decisions*".[56] Given the far-reaching consequences of being designated as an "oligarch", it is essential that **access to an effective judicial remedy should always be available. Draft legislation should provide clearly detailed procedure, or a cross-reference made to the relevant legislation regulating such a procedure**. A decision on recognizing a person as an "oligarch" and their inclusion on the register is made public within three days from such a decision (Article 6.5). **In light of the inherently negative and far-reaching consequences of such a recognition, it will be important to guarantee the right to a suspensive appeal of any public decision addressing potentially excessive and vested interests and subsequent restrictions. Any information implying that a person may be exercising excessive influence over political and public life should only be published after a final decision is reached, and after all legal remedies are exhausted.**

49. The formation and maintenance of the register is regulated by the government. The government's decision constitutes the basis for the inclusion of a person as an "oligarch" in the Register (Article 6), as well as removal from the Register (Article 9). As in the case of inclusion, a decision to remove an individual is adopted in the same manner, as provided by Article 5, lacking procedural safeguards and due process. Therefore, the analyses and recommendations provided in Sub-Sections 4.1 and 4.2 are also applicable here.

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[55] See Paragraph 5.10 of the *1990 OSCE Copenhagen Document*.

[56] Under Article 2.3(a) of the *ICCPR* States obligated themselves *"[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*" See also Article 15 of the *Human Rights Committee's General Comment No. 31*. In addition, Article 13 of the *ECHR* guarantees an effective remedy before a national authority to everyone whose rights and freedoms are violated, notwithstanding that the violation has been committed by people acting in an official capacity.

RECOMMENDATION E.

To substantially revisit the procedure for adopting a decision designating a person as an "oligarch" due to its inherent deficiency, lack of procedural and substantive safeguards, in particular since:

- it fails to specify, in clear and accessible terms, the procedure to be followed for collecting, sharing/processing, storing, and destroying collected data/information regarding an individual for the purpose of designation as an "oligarch", and does not grant explicit legal authorization to any specific official or body to collect such data for that purpose;
- it contains no requirement that all submissions be thoroughly substantiated, in compliance with personal data protection standards;
- it lacks clarifications about the rules of evidence applicable in the context of assessment of the submissions, especially in relation to the "inadequate discharge of tax obligations" or "substantial and/or systematic violations by the person of the requirements of the laws and regulations" for which only a decision of a court or competent public authority should be used as an element of proof;
- no adequate time is provided for each stage of the process, which would be necessary to ensure that the individual subject to the procedure has enough time to meaningfully prepare for the meeting where the relevant decision is adopted, also ensuring that his/her right to be heard is guaranteed; and
- the possibility of judicial appeal of the said decision should be provided, or if such a possibility already exists, a cross-reference to applicable legislation included, while ensuring that this appeal is suspensive and that any information implying that a person may be on recognizing a person as an "oligarch" under the Draft Law should only be published after a final decision is reached, and after all legal remedies are exhausted.

5. HUMAN RIGHTS IMPLICATIONS

50. The measures and restrictions proposed in the Draft Law imposed on individuals designated as "oligarchs" would unduly impact the exercise of their human rights and fundamental freedoms, including the rights to participate in public affairs, freedoms of expression, peaceful assembly, association as well as freedom of the media, the right of equality before the law and to be free from discrimination, the right to property, the right to respect for private and family life, and protection of their personal data. The severe restrictions are even more problematic when considering that they are based, as described above, on unclear terminology that does not adhere to the principle of legal certainty and using a flawed and unclear procedure.

5.1. Right to Participation in Public Affairs and to Stand for Election

51. Article 7(1) prohibits *"(a) making donations in the form of their own funds, the performance of work, provision of goods, services or cash, the performance of work, provision of goods, services by the affiliated persons and/or by the legal persons, in which such person is the ultimate beneficial owner, in support of political parties according to the Law of Georgia On Political Associations of Citizens; making donations to the election funds of candidates (other than to their own election fund), political parties during the electoral process in accordance with the Electoral Code of Georgia"* and *"(c) financing any political campaigning, or holding of rallies or demonstrations with political demands*."

52. By limiting the ability to provide financial or in kind support to political parties, making donations to electoral candidates or financing "*political campaigning or holding of rallies or demonstrations with political demands*", the proposed provisions introduce restriction to the right to participate in public affairs and to stand for election guaranteed by Article 25 of the ICCPR, the right to free elections (Article 3 of Protocol No. 1 to the ECHR), as well as to the rights to freedom of association, peaceful assembly, expression (see Sub-Section 5.2. below).

53. Article 25 of the ICCPR provides that the right to participate in public affairs cannot be subject to "*unreasonable restrictions*". General Comment no. 25 of the Human Rights Committee specifies that any conditions imposed should be "*based on objective and reasonable criteria*". Given the concerns raised as to the broad and vague criteria to designate a person as an "oligarch", this requirement would *prima facie* not appear to be fulfilled. Also, and as mentioned above, the restrictions are also directly linked to the property status of a person, which is a distinction that shall not be taken into account pursuant to Article 25 of the ICCPR read together with Article 2 of the ICCPR.

54. Moreover, while not preventing so-called "oligarchs" to stand for election and to have and contribute to their own election fund, it is unclear what would be the consequences of being nominated by a political party for an election. Should the prohibition to "*finance any political campaigning*" apply in that case, this could *de facto* limit their ability to seek elective offices on an equal footing with others. This would be contrary to Article 25 of ICCPR and Article 3 of Protocol No. 1 to the ECHR, which enshrine the principle of equal treatment of all citizens in the exercise of their electoral rights.[57]

55. Article 3 of Protocol No. 1 to the ECHR does not contain a list of legitimate aims capable of justifying restrictions nor does it refer to the "legitimate aims" listed exhaustively in Articles 8 to 11 of the ECHR. The ECtHR has considered that states may therefore rely on other aims, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the ECHR is proved in the particular circumstances.[58] It is understood that, as stated in the Preamble to the Draft Law, the legal drafters are aiming to limit the influence of "oligarchs" in political life for reasons of "national security". More generally, as underlined above, the phenomenon of "oligarchization" undermines democracy and the rule of law in Georgia and this could therefore constitute a legitimate aim. At the same time, any restriction should be proportionate to any legitimate aim invoked.

56. Generally, the adoption of political finance regulatory frameworks is intended to curb the negative influence that money in politics can have when political parties unduly rely

[57] See e.g., ECtHR, *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.), Application nos. 10547/07 34049/07, 29 November 2007.

[58] See ECtHR, *Ždanoka v. Latvia* [GC], Application no. 58278/00, 2006, para. 115.

on a few wealthy individuals for financing, thereby creating the risk that political parties' agendas and platforms disproportionately favour the interests of such individuals. Such frameworks aim to contribute to a more level playing field for electoral contestants, providing for transparency in politics through the disclosure of financial information, and by holding all electoral and political actors accountable through effective oversight and sanctioning mechanisms.

57. More specifically, although international standards and recommendations call for regulating political financing (including in-kind donations) and for creating a balance between state funding and private funding of political parties, financing of political parties is a form of political participation, considered a fundamental right and is also protected by the right to freedom of association.[59]

58. Good practices envisage limitations on funding in an attempt to limit the ability of particular categories of persons or groups to gain undue political influence and potentially intervene in public decision-making processes through financial advantages.[60] Thus, limits of donations from businesses and private organizations, including state owned/controlled companies and from anonymous donors, and limiting the amount of contributions from a single source, are considered positive to limit the influence of wealthy individuals and businesses.[61] It is, however, rather uncommon to prohibit or drastically limit private funding from a specific group of citizens. Private funding is generally considered as a means to foster citizens' participation in electoral processes and avoid the weakening of the linkage between political parties and electoral contestants with their electorate due to an excessive reliance on public funding.[62] As underlined in the Joint ODIHR/Venice Commission Guidelines on Political Party Regulation, *"[w]ith the exception of sources of funding that are banned by relevant legislation, all individuals should have the right to freely express their support for a political party of their choice through financial and in-kind contributions*" although *"reasonable limits on the total amount of contributions may be imposed and the receipt of donations should be transparent*".[63] The Guidelines further specify that in-kind-donations should be subject to the same restrictions as financial donations. Generally, a blanket prohibition of non-monetary donations outside of an election campaign appears a disproportionate limitation.[64]

59. The funding of political parties and campaigns are already regulated by respective laws in Georgia. According to Article 27 of the Law on Political Associations of Citizens, political parties and electoral subjects can receive funding from Georgian citizens and legal entities.[65] According to the said Law, donations from public and non-commercial legal entities, religious organizations, foreign sources, some types of public contractors,

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59 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 204, which provides that *"[f]unding political parties through private contributions is also a form of political participation. Thus, legislation should attempt to achieve a balance between encouraging moderate contributions and limiting unduly large contributions."*

60 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 211.

61 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), paras. 211-213. See also, for example, ODIHR-Venice Commission, *Joint Opinion on the Draft Law of Ukraine on Political Parties*, CDL-AD(2021)003, paras. 97-101; and *Joint Opinion on Draft amendments to Some Legislative Acts of Ukraine Concerning Prevention of and Fight against Political Corruption*, para. 35. This is especially relevant in light of the finding and recommendations in ODIHR, *Georgia - Local Elections - ODIHR Election Observation Mission Final Report (2021)*, p. 17, which notes: "*Significant imbalances in the campaign income and expenditure contributed to an unlevel playing field. Several ODIHR EOM interlocutors noted that parties have limited grassroots funding and tend to rely on big corporate donors when in office*."

62 Article 8(a)i of *2001 Parliamentary Assembly of the Council of Europe Recommendation 1516 on the financing of political parties*: "States should encourage citizens' participation in the activities of political parties, including their financial support to parties."

63 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 209.

64 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 216. See also ODIHR and Venice Commission, *Joint Opinion on the Draft Law on Political Parties in Mongolia* (20 June 2022), para. 86.

65 Article 27.1 of the Law on Political Associations of Citizens provides that *"[t]he total amount of donations received by a party from each citizen may not exceed GEL 60,000 per year and the total amount of donations received from each legal person may not exceed GEL 120,000 per year."*

anonymous sources, and contributions made in the name of another person/through an intermediary are forbidden.[66] Monetary and in-kind donations from individuals are limited to GEL 60,000 and donations from legal entities are capped at GEL 120,000. All monetary donations have to be made through wire transfers to trace the identity and permissibility of the donors, which is good practice, as well as reported to the State Audit Office of Georgia.[67] Similarly, Article 54 of the Election Code reiterates same limits for funding election/referenda campaigns.

60. Hence, regulations and safeguard are already part of the legal framework and Article 7 of the Draft Law adds an absolute ban to the already existing limitations regarding yearly contributions by natural persons to political parties and electoral contestants. If the measures envisaged in the existing law are deemed insufficient, some of the safeguards could be further enhanced, following open, inclusive and effective consultations with all relevant stakeholders, including political parties. For instance, in light of the increasing state practice to simply **ban donations from companies to political parties and election candidates,[68] this could be considered. In addition, any loopholes that may exist which can be used to circumvent the existing funding limitations and caps, such as funding by "third parties" should be addressed**.[69] If the issue is the lack of effective enforcement, there should be an in-depth analysis of the reasons behind such lack of implementation to identify adequate measures, legislative or not, to address the issues. As underlined in its 2021 Election Report, ODIHR specifically recommended to consider further measures to ensure the independence of the campaign finance oversight body and to ensure that it is fully mandated and resourced to monitor campaign funding and thoroughly review campaign finance reports.[70] However, imposing an absolute ban on donations for so-called "oligarchs" would appear unnecessary and disproportionate, and at odds with international instruments that highlight the importance of private funding as a form of political participation. In contrast, requirements for the disclosure of political financing coupled with effective and independent oversight are the main policy instruments to help ensure a level playing field to electoral contestants and political actors and enhance transparency.

61. In light of the foregoing, **any complete ban on providing financial or in-kind support to political parties, campaigning and campaign financing, as currently envisaged in Article 7 of the Draft Law, should be reconsidered.**

62. In addition, the Register (see Section 4) bears some similarities with the widespread practice across the OSCE region to establish registers of lobbyists in order to identify the (private) interests represented by consultant lobbyists in contact with executive or elected officials.[71] **To draw a parallel with lobbying regulations, instead of banning persons included on the Register from participating in the financing of political parties and electoral campaigns, the data contained in the Register could be linked with information on donations published on the State Audit Office's website to**

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66 See Articles 26.1 and 27.6 of the Law of Georgia on Political Unions of Citizens, see <On Political Associations of Citizens | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge)>.

67 Article 25-1(c) of the Law on Political Unions of Citizens defines in-kind donations as "tangible or intangible assets and services received by a party/ electoral subject from a natural or legal person free of charge, at discounted process or on concessional terms." The definition does not include voluntary work performed by volunteers, whose costs do not have to be accounted for in the campaign finance reports.

68 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 214.

69 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), Interpretative Notes, Part IV, 2(c).

70 See ODIHR, *Georgia - Local Elections - ODIHR Election Observation Mission Final Report (2021)*, p. 19.

71 For instance, in the United Kingdom, the 2014 Lobbying Act established a register of consultant lobbyists and a Registrar of consultant lobbyists that is responsible for supervising and enforcing the registration requirements.

check "oligarchs"' financing patterns and identify any conflict of interest or significant influence exerted on some particular politicians/political parties.[72]

5.2. Rights to Freedoms of Association, Peaceful Assembly and Expression

63. The financing of political parties is an integral part of the right to freedom of association guaranteed by Article 22 of the ICCPR and by Article 11 of the ECHR, which also encompasses any type of support to associations, including in the form of financial or in-kind support.

64. Further, Article 7.1(a) of the Draft Law implies that an "oligarch" can compete in elections; however, Article 7.1(c) prohibits an "oligarch" from "*financing any political campaigning or holding of rallies or demonstrations with political demand".*

65. The terminology "*rallies or demonstrations with political demand*" is vague and could actually cover a broad range of assemblies covering a myriad of topics, be it during or outside election period. Such restrictions or bans on rallies or demonstrations would in turn affect the right of an "oligarch" to freedom of peaceful assembly and express his/her opinion on a given matter, and should also be assessed from the perspective of the right to freedom of expression[73] guaranteed under Article 19 of the ICCPR and Article 10 of the ECHR

66. The protection of fundamental rights, including the rights to freedom of association, peaceful assembly, and expression, is granted to all persons, regardless of their status. Any restriction of these rights must be in conformity with the specific permissible grounds of limitations and requirements set out in the relevant international obligations and standards and must be necessary in a democratic society, and non-discriminatory.

67. Hence, the above-mentioned restriction can only be justified if they pursue a legitimate aim specified in international instruments, are prescribed by law which complies with the principle of legal certainty and foreseeability and is proportionate to the legitimate aim pursued and necessary in a democratic society.

68. "National security" invoked by the legal drafters is among the legitimate aim listed in Articles 19 and 21 of the ICCPR and Articles 10-11 of the ECHR. That being said, restrictions can only be justified if they are necessary to avert a real, and not only hypothetical danger.[74] The ECtHR has specifically underlined that a "pressing social need" for restrictions presupposes "plausible evidence" of a sufficiently imminent threat to the state or to a democratic society.[75] The scope of these legitimate aims should also be narrowly interpreted.[76] The reasoning attached to the Draft Law does not really elaborate on the linkages between "oligarchization" and "national security".

69. Generally, complete bans on the rights to freedoms of peaceful assembly, association and expression as the one envisaged in the Draft Law should be approached with caution, all the more given its interlinkages to the right to political participation for persons who contest an election. This may unduly impact the level playing field for political contestants. Moreover, it is not clear how the holding of rallies and

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[72] The linkage between lobbying and political finance has been demonstrated in some instances and it is striking to underline that while the two phenomena are closely interlinked as regards their goals, i.e., influencing policy discourse, they are often subject to separate regulations. The approach to look at both issues in a more coordinated and comprehensive fashion by connecting information on donations with information on lobbying would help reveal some unlawful practices. See International IDEA, *Towards a more integrated approach to lobbying and political finance regulation in the EU*, International IDEA, June 2022.

[73] See ODIHR-Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (3rd ed., 2019), para. 4.

[74] See e.g. the U.N. Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005), para. 7.2.

[75] See e.g. ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania*, Application no. 2330/09, 31 January 2012, para. 69.

[76] See ODIHR-Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (3rd ed., 2019), para. 28. See also paras. 21 and 76, which provide that "*[f]reedom of peaceful assembly is recognized as a fundamental right in a democratic society and should be enjoyed, as far as possible, without regulation*".

demonstrations "with political demands" might endanger Georgia's national security, thereby putting into question the very necessity of the prohibition. Other less restrictive measures regarding transparency and integrity in the financing of political parties and election campaigns are already in place and should be further enhanced rather than introducing a complete ban.

70. Hence, it is questionable whether such a prohibition is justified and proportionate. **The complete prohibition on funding the holding of rallies or demonstrations "with political demands" should therefore also be reconsidered by the legislators.**

RECOMMENDATION F.

To exclude any complete ban on providing financial or in-kind support to political parties, electoral campaigning, and financing any political campaigning, or holding of rallies or demonstrations with political demands which is currently envisaged in Article 7 of the Draft Law, in order to avert undue restrictions on the rights to freedoms of association, peaceful assembly, expression, and political participation.

5.3. Right to Respect for Private and Family Life and Data Protection

71. As mentioned in Sub-Section 4 above, the procedure for designating a person as an "oligarch" may involve the collection, storage, processing, and transfer of personal data by the various institutions/authorities involved in the procedure (Article 5). In addition, the Register also includes a number of personal information about "oligarchs" (Article 6 of the Draft Law). An "oligarch' is also obliged to submit declarations of assets on a yearly basis (Article 7(2) of the Draft Law) and public officials are required to declare their contacts with individuals designated as "oligarchs" or their representatives (Article 8 of the Draft Law).

72. Article 17 of the ICCPR protects everyone from arbitrary or unlawful interferences with their "privacy, family, home or correspondence". The right to respect for one's private and family life, home, and correspondence is also enshrined in Article 8 of the ECHR and may only be limited if it is prescribed by law and pursues a legitimate aim listed therein, and it is necessary in a democratic society. A number of provisions of the Draft Law compromise the enjoyment of this right.

73. As emphasized by the UN Human Rights Committee in its General Comment no. 16 on Article 17 of the ICCPR, "*relevant legislation must specify in detail the precise circumstances in which such interferences [with private life] may be permitted*" and a decision "*to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis*".[77] As emphasized in the case-law of the ECtHR, the legislation in this sphere must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which the authorities are entitled to resort to measures affecting their rights under the ECtHR and under which conditions.[78] Of note, the fact that information is already in the public domain does not necessarily remove the protection of Article 8 of the ECHR.[79] It is not clear from the Draft Law which authorities are authorized to collect data, under which conditions and which types of data. **The procedure to be followed for collecting,**

[77] UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para. 8.
[78] See e.g., ECtHR, *Fernández Martínez v. Spain* [GC], 12 June 2014, para. 117.
[79] See ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], 27 June 2017, paras. 133-134.

sharing/processing, storing, and destroying collected data/information regarding should always be clear and accessible to the public. Any public body / official authorized to collect data in this context should be granted explicit legal authorization.

74. Article 6 of the Draft Law provides for the publication of personal information about the "oligarch" in a Register. It must be underlined that Article 7(3) of the UNCAC calls upon States Parties to adopt appropriate legislative and administrative measures to enhance transparency in the funding of candidatures for elected public office and funding of political parties. At the same time, the publication and storing of personal data such as the one envisaged in the Draft Law interferes with the right to respect for private life protected under both the ICCPR and the ECHR. Transparency and accessibility of information would appear to be important principles as part of a wider attempt to increase trustworthiness and integrity of the work of the government. As emphasized in the Joint Guidelines on Political Party Regulation, *"[w]hile transparency may be increased by requirements to report the identities of donors, legislation should also balance this requirement with exceptionally pressing privacy concerns of individual donors in cases where there is a reasonable probability of threats, harassment or reprisals. Some states require the publication of names and addresses of all donors, others only ask for the identity of donors surpassing a certain monetary threshold*".[80] In any case, the publication of information on a person designated as an "oligarch" should be taken with care and consideration. Beyond the stigmatizing effect of being designated as an "oligarch", it is noted that Article 8 of the ECHR also protects the reputation of individuals.[81]

75. In light of the foregoing, **it is questionable whether the publication of such information on the website of the government and in a public Register is necessary and proportionate to the legitimate aim pursued and this should be re-assessed**.[82] Also, as mentioned above, it is important to ensure that there is a possibility to challenge the decision, with suspensive effect (paragraph 48 above).

76. Further, according to Article 7.2 of the Draft Law, upon inclusion in the Register, persons who are recognized as "oligarchs" are required to submit a declaration of assets as prescribed by the Law of Georgia on the Prevention of Corruption.[83] The Draft Law aims thus to supplement the existing legislation by subjecting persons who wield significant economic and political weight in public life to the submission of a declaration of assets and interests – to be filed with the Government of Georgia – to assess any potential situation of excessive economic or political influence. Any person can request these declarations, except for certain information including the personal number, address of the place of permanent residence and telephone number.[84] While such requirement can be justified for public officials, as envisaged by these laws, such detailed disclosure for "oligarchs" (and their family members),[85] as private persons, should be approached with caution in light of the right to privacy protected under Article 17 of the ICCPR and Article 8 of the ECHR. In addition, its narrow scope might entail a risk that such disclosure be used (and abused) for political purposes. **Instead, alternative ways should be explored to verify these assets and assess whether they may be linked to**

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80 See ODIHR-Venice Commission, *Joint Guidelines on Political Party Regulation* (2nd ed., 2020), para. 256.

81 See ECtHR, *Axel Springer AG v. Germany* [GC], 7 February 2012, para. 83.

82 In ECtHR, *Kilin v. Russia*, 11 May 2021, the Court has ruled that *"[w]hen referring to a legitimate aim, the Government must demonstrate that, in acting to penalise an applicant, the domestic authorities had that legitimate aim in mind*." See also *Vavřička and Others v. the Czech Republic*.

83 According to *the Law of Georgia On the Fight against Corruption*, the declarations are submitted to the Civil Service Bureau.

84 See Article 15 and 19 of *the Law On the Fight against Corruption*.

85 Article 15 of *the Law On the Fight against Corruption* specifically refers to family members.

potential acts of corruption or commission of other criminal offences. In any case, **the same safeguards as those applicable to the declarations of assets of public officials should also be applicable. Documents against which asset and interest declarations can be checked should be spelled out in the Regulation to avoid any kind of biased enforcement of the rules**.[86]

77. Lastly, Article 8 of the Draft Law introduces a declaration of contact between a public servant and an "oligarch" when such a contact occurs. In the same way, persons included on the Register and their representatives have to self-declare that they are included on the Register.

78. The same article defines contact as "*a meeting and conversation (including online), communication, irrespective of the content thereof, by telephone or by electronic communication facilities.*" Exceptions to the obligation to declare include situations such as (1) at the official event that was broadcasted for mass reception, (2) court session and (3) conferences, initiated by the government, provided that information about them is posted on the government's website (Article 8.3). This, however, does not exclude private meetings and conversations. If read in conjunction with Article 8.7, which provides for details in the declaration, including a summary of the meeting, there are significant concerns over the right to privacy. While the legal drafters may have been guided by the aim to contribute to the transparency of public officials' work, Articles 8.4 and 8.7 are problematic as it provides for the disclosure also of the content of the communications, which is the most sensitive information protected by the right to respect for private and family life.[87] In many countries similar provisions are in place for lobbyists but in those provisions, only specific types of contacts should be reported - for example, lobbying for regulatory changes. In case similar requirements to report are introduced, it is important to make sure that **the types and contents of contacts are more precisely and strictly defined.**

79. More generally, if the purpose is to manage or prevent conflicts of interest in the public sector as stated in the reasoning attached to the Draft Law, there are also other measures that should be contemplated or further strengthened in compliance with international human rights standards,[88] including the rules and institutional framework on conflict of interest,[89] lobbying activities, transparency in the handling of public affairs and public integrity.

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[86] In Greece, for instance, information provided in asset declarations can be verified against tax returns and in Romania, information is verified with reference to the land, motor vehicle, real estate and other property registries.

[87] See also Article 12 of the *UDHR*. In *Bărbulescu v. Romania*, the Court ruled that Member States also have positive obligations to ensure that Article 8 rights are respected even as between private parties. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life (*Lozovyye v. Russia*).

[88] As emphasized in UN Human Rights Committee's General Comment no. 25, measures to avoid any conflicts of interest should not unduly limit citizens' political rights; see General Comment no. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, para. 16.

[89] Some countries have regulated the issue, inter alia, through self-regulatory measures, such as codes of conduct designed to provide clear guidance regarding potential conflicts of interest, existing enforcement and sanctioning mechanisms to executive officials and parliamentarians (e.g., Ireland, Luxembourg or the UK) while others have adopted legislative measures (e.g., Italy, Slovenia, Spain, and Sweden). For more information, see GRECO, 4th evaluation round, Evaluation and Compliance Reports, Prevention of corruption in respect of members of parliament, judges and prosecutors, Strasbourg and GRECO, 5th evaluation round, Evaluation and Compliance Reports, Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, Strasbourg.

RECOMMENDATION G.

To substantially reconsider the obligations and consequences linked to the designation of a person as an "oligarch" with a view to ensure compliance with the right to respect for private and family life, in particular since:

- the publication of personal information (on "oligarchs") on the website of the government and in the public Register may fail to satisfy requirements of necessity and proportionality and unduly impact the right to privacy;
- the obligation to submit assets declarations may not appear justified and necessary, in particular since there may be alternative ways to verify these assets and assess whether they may be linked to potential acts of corruption or commission of other criminal offences;
- the reporting obligations imposed on public servants appear cumbersome, and rather vague and broad and could be addressed by alternative means, such as lobbying reporting.

6. PROCEDURE FOR ADOPTING THE DRAFT LAW

80. The Draft Law was initiated on 5 October 2022, and was already voted on in the first and second readings on 3 and 16 November 2022, respectively, although it has now been returned for reconsideration in second reading, which is welcome as it may offer an opportunity to reconsider the overall approach and review the serious concerns raised in the Opinion

81. Generally, while the request noted that civil society was involved in the drafting process, more time should have been afforded for the consultation process to be more inclusive and reach a broader audience and consensus, including with the opposition.[90]

82. OSCE participating States committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, paragraph 5.8).[91] Moreover, these commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, paragraph 18.1).[92] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[93]

83. Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[94] To guarantee effective participation, consultation mechanisms should

[90] From the records (*3 November* and *16 November*) of the hearings, it appears that the opposition either did not vote or voted against.
[91] See *1990 OSCE Copenhagen Document*.
[92] See *1991 OSCE Moscow Document*.
[93] See Venice Commission, *Rule of Law Checklist*, Part II.A.5.
[94] According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account,

allow for input at an early stage and throughout the process, meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament.[95]

84. Given the substantial deficiencies of the Draft Law and the lack of substantiation in the reasoning attached to the Draft Law, there appears not to have been a proper ex ante evaluation and impact assessment of the planned legislation, including a proper verification of the Draft Law for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process.[96] Furthermore, given the potential substantive changes brought by the Draft Law, sufficient *vacatio legis* should be provided to allow adequate time for implementation.

85. In light of the above, and whatever the approach followed, **the authorities are encouraged to ensure that any legislative and non-legislative proposals aimed at reducing the excessive influence of vested interests in political and public life is subject to a transparent and inclusive process that involves meaningful consultations with all relevant stakeholders, including with representatives of various political parties, academia, civil society organizations, which should enable equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the policy- and law-making process, including before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Law and its impact should also be put in place that would efficiently evaluate the operation and effectiveness of the Draft Law, once adopted**.[97]

RECOMMENDATION H.

Whatever the approach followed, the authorities are encouraged to ensure that any legislative and non-legislative proposals aimed at reducing the excessive influence of vested interests in political and public life is subject to a transparent and inclusive process that involves meaningful consultations with all relevant stakeholders, including with representatives of various political parties, civil society organizations, academia, throughout the policy- and law-making process.

inter alia, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), pars 40-41.

95 See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), paras. 33-34. See also ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs.

96 See e.g., 2015 ODIHR Report on the Assessment of the Legislative Process in Georgia, pages 6-7.

97 See OECD, *International Practices on Ex Post Evaluation (2010)*.